Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CHARLES C. THOMPSON, II,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether Executive Privilege, as incorporated into the Freedom of Information Act, 5 U.S.C. §552(b)(5), may properly be invoked to deny an investigative journalist access to documents that may reveal misconduct or malfeasance by officials of the U.S. Department of the Navy simply because, by happenstance, they were generated during discussions about media inquiries.

2.) Whether the U.S. Department of the Navy could freely relitigate the propriety of its claim of Executive Privilege, when that identical claim was rejected previously by another district court in a civil discovery dispute.

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Petitioner Charles C. Thompson, II, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The substantive order of the court of appeals was issued on March 11, 1998 (App. 1a). The order of that court denying reconsideration was issued on April 8, 1998 (App. 3a). Rehearing and rehearing *en banc* were denied in two separate orders issued on June 15, 1998 (App. 4a, 5a).

The final order of the district court was issued on August 18, 1997 (App. 25a). During the course of proceedings in that court, three other orders relevant here were issued on December 6, 1995; April 16, 1996; and June 19, 1997 (App. 6a, 12a, 23a). To the knowledge of petitioner's counsel, none of these orders has been published.

JURISDICTION

The orders of the court of appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were issued on June 15, 1998. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. §552, provides as follows, in pertinent part:

> [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

> This section does not apply to matters that are inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. §§552(a)(3), 552(b)(5).

STATEMENT OF THE CASE

Introduction

The orders issued by the lower courts here stand for an untenable and objectionable proposition, one that greatly interferes with the public's right to know about government misconduct and its ability to hold officials of the Executive Branch accountable for their actions. Specifically, these courts held that ruminations about upcoming media inquiries are *per se* exempt from disclosure under the Executive Privilege component of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(5). The potential for abuse of this unique ruling was illustrated in this case itself.

For five years, the U.S. Department of the Navy ("the Navy") invoked Executive Privilege first to deny the existence of and later to withhold a document because it contained embarrassing criticism of the journalists who were aggressively investigating its misconduct. Only by repeatedly challenging the Navy's searches did petitioner force it to admit to the existence of this document and secure the release of over 200 similar documents. Finally, after years of stonewalling, the Navy was forced to reveal its abiding antipathy toward freedom of the press and its eagerness to engage in subterfuges so that senior officers could evade accountability for their actions.

This case represents the most trifling invocation of Executive Privilege ever upheld by a federal court, at least to the knowledge of petitioner's counsel. It may also represent the only case under the FOIA resolved in the government's

favor without regard to the content of the documents withheld or the circumstances of their creation. The outcome here is thus fundamentally at odds with the policies underlying the FOIA.

The result below is also at variance with proper application of the doctrine of collateral estoppel. The Navy's claim of Executive Privilege over the very documents at issue here was previously rejected in a civil discovery dispute by another district court. The successful relitigation of this issue has allowed the Navy to escape accountability for a shameful episode for almost ten years.

This case concerns four documents relating to the Navy's failed campaign to mislead the public about the explosion aboard the U.S.S. Iowa in 1989. The Navy attempted to blame this tragedy on an innocent seaman, Clayton Hartwig, who supposedly killed himself in despair over the end of his affair with another seaman. The Navy has since officially recanted this disgraceful fabrication and apologized to the Hartwig family. The family subsequently sued the Navy under the Federal Tort Claims Act in *Hartwig v. United States*, 92-1315 (N.D. Ohio).

The district court presiding over the *Hartwig* litigation rejected the Navy's claim of Executive Privilege over the very documents at issue here. However, the documents were only disclosed under a protective order and the merits remain undecided. To this day, the public still does not have a complete and truthful account of the Navy's activities during and after the Iowa explosion. This case, in all likelihood, represents its final opportunity.

Statement Of Facts

Petitioner in this action, Charles C. Thompson, II, is an author, investigative reporter, and producer of segments of television news programs such as *60 Minutes* and *20/20* concerning military affairs. Mr. Thompson is a former Navy officer and has a special interest in uncovering illegal activity

and malfeasance in the Navy. He is an author of books about matters such as these and is currently investigating the suicide of former Chief of Naval Operations Michael Boorda, the explosion on the U.S.S. Iowa, and cover-ups and wrong-doing by the Navy in connection with these and other events.

On June 1, 1993, Mr. Thompson filed a FOIA request with the Navy requesting the following categories of documents:

> Documents generated in connection with sessions — known as "Murder Boards" — to prepare two Admirals for press conferences about the explosion on the U.S.S. Iowa and the Navy's investigation into that explosion.
>
> Documents generated in connection with a Murder Board to prepare the Chief of Naval Operations for a press conference in which the Navy apologized to the family of the Gunners Mate Clayton Hartwig, the innocent seaman upon whom the Navy schemed to the blame for the accident.
>
> Documents generated in connection with the Iowa explosion and resulting investigation that were related to internal briefing reports prepared by the Office of the Chief of Naval Information.

The Navy denied Mr. Thompson's request on June 17, 1993.

Proceedings In The District Court

After the Navy took no action on his appeal, Mr. Thompson initiated suit below by filing a Complaint in the U.S. District Court for the District of Columbia on February 22, 1995. [1] The Navy responded on March 14, 1995, by

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[1] That court had jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

moving dispositively, on the ground that Mr. Thompson failed to exhaust his administrative remedies. Mr. Thompson opposed that motion and moved the district court to order the Navy to submit an index as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). On December 6, 1995, the district court denied the Navy's motion and ordered it to submit a *Vaughn* index (App. 6a).

The Navy submitted its first index on January 31, 1995. There, it claimed to have located only five documents, all of which it withheld under the Executive Privilege component of Exemption 5 of the FOIA. Mr. Thompson objected on the grounds that the search was grossly inadequate and that it was not accompanied by a detailed affidavit supporting any exemption claims. The district court agreed and ordered the Navy to file a new index on April 16, 1996 (App. 12a).

On June 10, 1996, the Navy filed a revised *Vaughn* index and identified 220 responsive documents. Seven were withheld; subsequently, one was released. The four documents that are at issue on this appeal were among those which remained withheld. The Navy's revised *Vaughn* index described them as:

> **Document No. 2:** '[N]otes re: questions for' former Deputy Judge Advocate General 'and deliberations regarding proposed responses to media inquiries concerning' the Naval Investigative Services' 'involvement in USS IOWA investigation and other issues related to investigation.'
>
> **Document No. 3:** 'Memorandum' containing 'notes from Media Training Center' containing 'commentary and advice concerning dealing with the media in connection with the USS IOWA investigation, including discussions and proposed responses to media inquiries, as well as advice on gestures and attitudes.'
>
> **Document No. 4:** Memorandum containing '[d]raft response to media inquiry re: cause of

death, including topics to consider in preparing to respond to media inquiries.'

Document No. 5: 'Videotape of RADM Milligan in preparation for 60 Minutes interview. Outlines, in TV interview format, anticipated questions, with recommended Navy position in response to numerous questions on the investigation into the explosion on board USS IOWA.'[2]

(Petition for Rehearing App.)

The revised index identified Exemption 5 as the basis for withholding each document and contained the following boilerplate rationale that each document:

> outline[d] prospective strategy for future media statements by senior agency officials. Contains pre-decisional, deliberative material prepared by agency personnel for internal dissemination only. Release of this information could chill vigorous intra-agency analysis and recommendation, inhibiting decision-making process.

(Petition for Rehearing App.) With such inadequate justification, petitioner moved for summary judgment and specifically argued that the Navy had improperly claimed Executive privilege without "a detailed affidavit from Secretary Dalton, or any other official, to support the executive privilege claim. Rather, the government has simply asserted in the index that the documents are deliberative." The district court agreed. On June 7, 1997, it ordered the Navy to submit a detailed affidavit in support of its revised *Vaughn* index (Petition for Rehearing App.).

The Navy filed an affidavit in response to this order on June 19, 1997. While longer, it did not provide significantly

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[2] Single quotation marks in the foregoing descriptions material reflect material quoted *verbatim* from the revised index; other material has been paraphrased.

greater information than its predecessor, although it discussed the importance which the Navy places upon its public relations. Like its predecessor, this affidavit was not executed by the Secretary of the Navy or an official delegated the responsibility to claim Executive Privilege. Eventually, however, these final submissions provided the basis for the district court's award of summary judgment over the four documents at issue here.

Decisions In The District Court And The Court Of Appeals

It was literally impossible to apprehend the reasons why the Navy sought to keep these documents confidential from its final submission. However, the media-related document belatedly released by the Navy during this litigation (Document No. 1) entitled "The Iowa Story" revealed more about what it had been withholding than did its inadequate indices and affidavits. It stated:

> *60-Minutes*: It was clear months ago that Mike Wallace, and his producer Charlie Thompson, were going to do a segment which would indicate that in their opinion, the Navy unfairly blamed Gunners Mate Hartwig . . . CHINFO knew the '60-Minutes' piece would be negative and hit the theme of 'the brass versus the little guy.'
>
> * * * *
>
> Leaks: From the beginning of the original IOWA investigation, leaks to the news media drove Navy leadership and Navy PAO's crazy . . . The news was filled with stories on who did what and what human was (or was not) to blame . . . It is a sad fact that someone (unnamed) leaked Navy investigative data . . . [and] that the news media themselves either were used, or let themselves be used, by various vested interest groups . . . [including] media street smart lawyers.

* * * *

> Too bad the news media accept no blame, for it was their public reports which brought the real grief to our IOWA families . . . Such is the price of Freedom of the Press. which the Navy withheld for five years,

(Petition for Rehearing App.). This is the very document claiming that it "contains deliberations related" to an interview of the former Chief of Naval Operations. Like the remaining four documents which are still withheld, the Navy based nondisclosure on Exemption 5 and a boilerplate recitation that "[r]elease of this information could chill vigorous intra-agency analysis and recommendations, inhibiting the decision-making process" (Id.).

The release of Document No. 1 plainly confirmed petitioner's argument that the Navy improperly invoked Executive Privilege to avoid embarrassment rather to protect genuinely confidential policy-making deliberations. Nonetheless, the district court granted summary judgment to the Navy and permitted it to withhold Document Nos. 2 through 5 in its final order on August 18, 1997, holding:

> The Navy's affidavits establish that it was engaged in a pre-decisional, deliberative process concerning what information it was going to disclose to the media vis-à-vis the explosion aboard the USS Iowa. In addition, the Navy has sufficiently demonstrated what role the items in issue played in that process. That is, the items were prepared by subordinate officials for the benefit of senior Navy officials who were preparing for inquiries from members of the media.

(Petition for Rehearing App.). Finding that disclosure of these deliberations could stifle intra-agency deliberations, the court upheld the Navy's claim to nondisclosure under Exemption 5 (App 25a at 7).

The Navy moved for summary affirmance in the court of appeals on the ground that: "Courts have unhesitatingly ruled that predecisional, deliberative materials that touch upon public relations activities are protected by the deliberative process privilege" (Mot. for Sum. Aff. at 7). In point of fact, there are no decisions to this effect. Furthermore, the propriety of withholding the very documents at issue here was conclusively decided *against* the Navy in the *Hartwig* litigation (App. 35a).

On March 11, 1998, a panel of the D.C. Circuit summarily affirmed the decision below (App. 1a). Shortly thereafter, that panel denied Petitioner's motion to schedule the appeal for full briefing, without prejudice to petitioner's right to seek rehearing and suggest that the full Circuit hear the case *en banc* (App. 3a). Two separate orders denying petitioner this relief were issued on June 15, 1998 (App. 4a, 5a).

REASONS FOR GRANTING THE WRIT

I. Executive Privilege May Not Be Invoked For Trifling Purposes, Such As Concealing Embarrassing Opinions Which Government Officials Happen To Commit To Writing While Preparing For Media Inquiries.

Exemption 5 of the Freedom of Information Act exempts "intra-agency memorandums or letters which would not be available by law to" a private party "in litigation with [the] agency" from disclosure to the general public. 5 U.S.C. §552(b)(5). Its purpose is to incorporate a number of evidentiary privileges into the FOIA. The one that is relevant here is "the Government's executive privilege." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1974); *accord Federal Open Market Committee v. Merrill*, 443 U.S. 340, 351 (1978). In the context of the FOIA, this privilege focuses "on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck*, 421 U.S.

at 151 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)).[3]

Seminal case law has recognized for longer than 40 years that: "'Executive privilege is a phrase of release from requirements common to private citizens or organizations' — an exemption essential to discharge of highly important executive responsibilities." *Carl Zeiss Stiftung*, 40 F.R.D. at 324 (quoting *Kaiser Aluminum & Chemical Corp v. United States*, 141 Ct. Cl. 38, 157 F. Supp. 939, 944 (1958)). Unique to the government as sovereign, it is only in the exercise of sovereign functions of "decision- and policy-making" that Executive Privilege may be used to shield government action from public scrutiny. *Carl Zeiss Stiftung*, 40 F.R.D. at 325.

> *The privilege belongs to the Government . . . and is not to be lightly invoked.* There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.

United States v. Reynolds, 345 U.S. 1, 8 (1953) (emphasis supplied). "Judicial control over the" invocation of the privilege has never been and "cannot be abdicated to the caprice of executive officers." 345 U.S. 10

The propriety of a claim of Executive Privilege turns on whether the information in question is "integral to an appropriate exercise of the executive's decisional and policy making functions . . ." *Carl Zeiss Stiftung*, 40 F.R.D. at 325. For this reason, the decisions of this Court and lower federal courts have upheld claims of Executive Privilege only in the most compelling circumstances, where disclosure would reveal the processes by which officials of the executive branch formulated government policy or discharged sovereign, government functions. Invocation of the privilege

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[3] In FOIA litigation, the privilege is alternately referred to as the deliberative process privilege. *See generally, EPA v. Mink*, 410 U.S. 73 (1972).

was upheld to exempt from disclosure documents which contained "conflicting recommendations on the advisability of [an] underground nuclear test" given to the President of the United States, *EPA v. Mink*, 410 U.S. at 75; confidential advice rendered by the Attorney General of the United States about "high level policies" concerning sensitive international commercial transactions, *Carl Zeiss Stiftung*, 40 F.R.D. at 328; directions from an agency's General Counsel to field offices to initiate litigation, *NLRB v. Sears, Roebuck*, 421 U.S. 160; and reports containing recommendations to the body charged with recouping excessive charges by government contractors. *Renegotiation v. Grumman Aircraft*, 412 U.S. 168 (1974). It has never been invoked, much less upheld, to deny the public access to the process by which decisions not central to sovereign government functions were made.

No decisional or policy-making process was threatened with interruption here. Indeed, it was by no means clear that the Navy was engaged in *any* decisional process whatsoever. The most that the Navy ever articulated was that the documents in question were created when the Navy was caucusing about media inquiries into misinformation it disseminated earlier. Unless those meetings themselves were privileged decisional or policy-making meetings, without more, the fact that they concerned potential questions from journalists was insufficient to support a claim of Executive Privilege.

II. Matters Relating To Media Relations Are Not Per Se Exempt Under Exemption 5 of the FOIA.

There is no "generalized interest in confidentiality" which belongs to officers of the executive branch, not even to the President of the United States. *United States v. Nixon*, 418 U.S. 683 (1974). Thus, Exemption 5 of the FOIA may properly be invoked only when public disclosure of documents would impair the quality of the agency decision-making process by inhibiting a free and frank exchange of opinions and recommendations that lead to decisions about policy, legal advice, and action by the government as

sovereign. *National Labor Relations Board v. Sears Roebuck & Co.*, 421 U.S. 132; *Petroleum Information Corp. v. U.S. Department of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Nonetheless, according to the Navy, the exemption applied here even though it could "not identify a *specific* decision in connection with which the" documents in question were "prepared" (Mot. for Sum. Aff. at 6). The Navy further argued below that: "The fact that these records concern public affairs matters rather than weighty questions of national policy does not change their entitlement to protection . . ." (*Id.*).

Reduced to its essence, the Navy's position was that Documents Nos. 2 through 5 were *per se* exempt because they contained discussions about upcoming media inquiries. With the exceptions of the orders below, there is no precedent which holds that documents prepared in anticipation of media inquiries are exempt from disclosure regardless of their content. The reason is obvious: by itself, the fact that documents are prepared in anticipation of inquiries from the media is meaningless. In these as in all circumstances, Executive Privilege may be properly invoked *only* when disclosure of substantive information and opinions being exchanged would threaten a process in which the "discharge of highly important executive responsibilities" is being deliberated. *Carl Zeiss Stiftung*, 40 F.R.D. at 324.

This much is proven even by the two authorities cited in the panel Order. In *Access Reports v. Department of Justice*, 926 F.2d 1192 (D.C. Cir. 1995), the D.C. Circuit considered the applicability of Exemption 5 to a 200 page memorandum which responded point-by-point to a study containing 275 examples of earlier FOIA disclosures that would not have been made had an amendment proposed by the Department of Justice been enacted into law. 926 F.2d at 1193. The Department of Justice had "already released the factual portions" of the memorandum; the only ones withheld were "those containing [a staff attorney's] legal analysis and conclusions" that senior officials expected to rely upon in

responding to press inquiries and testifying before Congress. 926 F.2d at 1195-96. Only after identifying the deliberative process in question — namely, "how to shepherd the FOIA bill through Congress" — was the invocation of Exemption 5 upheld. 926 F.2d at 1196.

Similarly, in *Dudman Communications Corp. v. U.S. Department of the Air Force*, 815 F.2d 1565 (D.C Cir. 1987), the D.C Circuit upheld the nondisclosure of a manuscript concerning the role of the Air Force in the Vietnam War. In particular, the requester sought access to a section which might have contained information about "an unreported war crime." 815 F.2d at 1563. The rationale behind the *Dudman* decision was that release of the draft would reveal the deliberations by the Air Force in reaching the final decision not to classify the incident in question as a war crime. 815 F.2d at 1569. A specific and sovereign decision was identified, which was not so in this case.

According to the Navy and the lower courts here, all agency documents generated during a meeting where media inquiries are on the minds of government officials are exempt from disclosure, regardless of their content. This construction of the FOIA and relevant precedent is untenable. Exemption 5 is not available to shield every exchange between government officials simply because they were made during the course of considering responses to media inquiries.

III. The Navy Was Not Free To Relitigate The Applicability Of The Deliberative Process Privilege.

In the litigation brought by the Hartwig family, the Navy attempted to withhold the very documents at issue here under a claim of Executive Privilege. After conducting an *in camera* inspection of the four documents, the *Hartwig* court held:

> [R]eview of the documents shows, as the Magistrate Judge recommended, that the documents are considerations, Navy procedure or Navy operations that will not be considered to be covered by the

> deliberative process privilege. The video tape [Document No. 5] contains preparation of an official for a public appearance.

(App. 35a). The release of Document Nos. 2 through 5 was compelled by that court because it rejected the Navy's claim of privilege. The adjudication unquestionably bound the decisions here under general principles of issue preclusion. The lower courts, however, permitted the Navy to relitigate this issue, with the rationale that it had to be resolved by special rules applicable solely to discovery and FOIA litigation. There is no basis in law or reason for this holding. This much is clear from the very decision cited by the court of appeals, *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (the determinative inquiry is whether "the issues in the two proceedings are different.").

The Navy argued that it was free to re-litigate this issue because the ruling by the *Hartwig* court was "[c]ontrary to the precedent in this Circuit" (Mot. for Sum. Aff. at 9, n.4). The court of appeals credited this argument. Its decision was gravely in error.

It is correct that decisions of one district court do not bind another under the doctrine of *stare decisis*. Petitioner, however, was seeking to preclude relitigation of issues adjudicated previously under the doctrine of collateral estoppel. Under this doctrine, the decision of the *Hartwig* court — that Documents Nos. 2 through 5 were not the products of a privileged deliberative process — could not be litigated for a second time.

The Navy could have done so, if the *Hartwig* court had ordered the release of Document Nos. 2 through 5 despite the fact that they were the proper subjects of a claim of Executive Privilege. This would occur if, despite the applicability of the privilege, the plaintiffs there had an overriding need for those documents. In such circumstances, or where a discovery dispute is resolved on grounds of relevancy, discovery and FOIA litigation over the same documents may well end

differently. *Weber Aircraft Corp. v. United States*, 465 U.S. 792, 799 (1984).

However, FOIA and discovery litigation involving identical documents can end with disparate results only their outcomes turn on issues such as these. This much is evident from many cases, among them this Court's decision in *FTC v. Grolier*, 462 U.S. 19 (1983). There, this Court held that a document that represents attorney work product may properly be withheld under the work product component of exemption 5 of the FOIA, even though it might be subject to release in civil litigation. The reason is that all attorney work product is exempt from disclosure under the FOIA, whereas disclosure of the same document may be compelled under Rule 37, Fed. R. Civ. P., when "one party's need for otherwise privileged documents would be sufficient to override the privilege." 462 U.S. at 28.

By contrast, here and in *Hartwig*, there was but one core issue — the propriety of the Navy's claim of Executive Privilege. That issue was adjudicated against the Navy before the district court here entered its final judgment. The lower courts here erred in allowing the Navy to litigate it a second time.

CONCLUSION

For the foregoing reasons, petitioner Charles C. Thompson, II, respectfully requests that the Court issue a writ of *certiorari* to review the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5292 **September Term, 1997**
95cv00347

Charles C. Thompson, II

Appellant

v.

Department of Navy

Appellee

FILED MAR 11 1998
CLERK

MANDATE
Pursuant to the provision of Fed. R. App. Pro. 41(s)
Issued: 6/30/98
By: E. Brown

BEFORE: Williams, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted, substantially for the reasons stated by the district court in its order filed August 18, 1997. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). The documents at issue were properly withheld under exemption 5 of the Freedom of Information Act

("FOIA"). See 5 U.S.C. § 552(b)(5); Access Reports v. Department of Justice, 926 F.2d 1192 (D.C. Cir. 1991); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987). Collateral estoppel does not apply because the prior proceeding involved civil discovery rather than a FOIA action. See North v. Walsh, 881 F.2d 1088, 1095-97 (D.C. Cir. 1989); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). Appellant has waived his remaining contention by failing to raise it in the district court.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam
/s/ SFW
/s/ DJL
/s/ KLH

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5292 **September Term, 1997**
95cv00347

Charles C. Thompson, II,

Appellant

v.

Department of Navy,

Appellee

FILED APR 8 1998
CLERK

BEFORE: William, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of the motion of reconsideration, it is

ORDERED that the motion be denied without prejudice to appellant's filing a timely petition for rehearing and suggestion for rehearing in banc. See D.C. Cir. Rule 35(a) (when United States or agency thereof is a party, petition for rehearing or suggestion for rehearing in banc must be filed within 45 days of entry of judgment or other form of decision).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Linda Jones

for Robert A. Bonner
Deputy Clerk/LD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5292 **September Term, 1997**
95cv00347

Charles C. Thompson, II,

Appellant

v.

Department of Navy,

Appellee

FILED JUN 15 1998
CLERK

BEFORE: Williams, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed April 24, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5292 **September Term, 1997**
95cv00347

Charles C. Thompson, II,

Appellant

v.

Department of Navy,

Appellee

FILED JUN 15 1998
CLERK

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 95-347 RMU

Charles C. Thompson, II

Plaintiff

v.

Department of the Navy

Defendant

FILED
DEC 6-1995
Clerk, U.S. District Court
District of Columbia

ORDER

Denying Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment; Denying Plaintiff's Motion to Stay the Proceedings; and Granting Plaintiff's Motion for a Vaughn Index

This matter comes before the court upon defendant's motion to dismiss or, in the alternative, for summary judgment; opposition thereto; and reply therein; plaintiff's motion to stay the proceedings; opposition thereto; and reply therein; plaintiff's supplemental memorandum in opposition of defendant's motion to dismiss and in support of plaintiff's motion to stay the proceedings; and plaintiff's motion for a Vaughn Index; and opposition thereto. This case involves

plaintiff's request, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, for information regarding the United States Department of the Navy's preparation for public statements, of several Admirals, regarding the April 19, 1989, U.S.S. Iowa explosion. The defendant, the United States Department of the Navy, has moved this court to dismiss this action on the ground that the court lacks subject matter jurisdiction as a result of plaintiff's failure to exhaust his administrative remedies. The court concludes that defendant's motion for summary judgment shall be denied as plaintiff has carried his burden of proof regarding the issue of exhaustion of remedies; that plaintiff's motion for a stay of the proceedings shall be denied as moot; and that plaintiff's motion for a Vaughn Index shall be granted in order to allow the court to determine the number of responsive documents or items that are at issue and to arrive to an explanation as to why responsive information being withheld is putatively exempt from disclosure.

A. Background

By letter dated June 1, 1993, plaintiff filed a Freedom of Information Act ("FOIA") request with the Privacy Act/FOIA Branch, Office of the Chief of Naval Operations ("CNO FOIA Office") requesting information relating to the preparation of Admirals Leon Edney, Richard Milligan and Frank Kelso for press conferences dealing with the explosion on board the U.S.S. Iowa. By letter dated June 19, 1993, the CNO FOIA Officer forwarded plaintiff's request to the Navy's Chief of Information ("CHINFO"). By letter dated June 17, 1993, CHINFO responded to plaintiff's request stating that he identified a videotape responsive to plaintiff's request. The letter, however, informed plaintiff that the videotape was exempt from release pursuant to 5 U.S.C. § 552 (b) (5). Plaintiff avers that he filed an administrative appeal from CHINFO's denial of his request for information by letter dated June 24, 1993. Plaintiff further states that he was informed, by letter dated June 29, 1993, that his appeal had been referred to the Judge Advocate General for processing.

The defendant, on the other hand, asserts that plaintiff's appeal letter dated June 24, 1993, related to anther request for information filed by the plaintiff on May 4, 1993. This earlier request for information, which was ultimately denied on June 18, 1993, related to documents pertaining to the investigation of a Mr. Charles T. Gardner and the explosion on board the U.S.S. Iowa. Consequently, defendant states that it never received an appeal letter from the plaintiff regarding the latter's June 1, 1993 request for information. However, plaintiff has supplied the court with a copy of a letter addressed to the head of the PA/FOIA Branch of the Department of the Navy, at the Office of the Chief of Naval Operations, relating to the June 1, 1993 request. The defendant, however, maintains that it never received this second appeal letter and that the appeal letter should have been addressed to Judge Advocate General of the Navy. Moreover, defendant further states that if the PA/FOIA Branch would have received the letter, it would have been forwarded to the Office of the Judge Advocate General, as had occurred with the appeal of the May 4, 1993 request.

B. Discussion

Since the court is relying, in part, on matters outside the pleadings, the court will treat defendant's motion to dismiss as a motion for summary judgment. See Fed.R.Civ. P. 12 (c) and 56. The issue to be determined by the court is whether plaintiff has exhausted his administrative remedies. Under FOIA, exhaustion of remedies is generally required prior to the filing of a suit in federal court. Oglesby v. U.S. Dept. of Army, 902 F.2d 57, 61 (D.C. Cir. 1990). As part of this exhaustion requirement, the administrative appeal process provided for under FOIA must also be complete prior to the initiation of a suit in federal court. However, if a plaintiff proffers proper evidence that an appeal was made, his claim should not be dismissed on the sole ground that the defendant agency cannot locate the appeal in its files. Accordingly, if a plaintiff, as presently done, avers that he submitted an appeal letter and provides a copy of that letter and further attests that it was sent, there arises an issue of material fact that is in dispute thereby making summary judgment

inappropriate. Linn v. United States Dep't of Justice, No. 92-1406, 1995, 1995 WL 631847 at *11 (D.D.C. August 22, 1995) (stating that genuine issue of material fact was created thus making summary judgment improper when plaintiff provided the court with a copy of an appeal letter and an affidavit asserting that the letter was sent in a timely fashion although the agency had no record of its receipt); see also Hammie v. Social Sec. Admin., 765 F.Supp. 1224, 1226 (E.D. Pa. 1991) (asserting that in considering the government's motion to dismiss, the court is required to accept plaintiff's representations that he submitted requests for production).[1]

Although the defendant attests to the fact that plaintiff submitted his June 24, 1993 appeal letter, which defendant argues concerned the May 4, 1993 request for information, to the wrong office (the Head of the PA/FOIA Branch of the Department of the Navy, at the Office of the Chief of Naval Operations), it nevertheless concedes that it was forwarded to the proper party (the Judge Advocate General). Defendant further avers that had it received the second appeal letter relating to the June 1, 1993 request, it would have been similarly forwarded. Consequently, the fact that plaintiff may have addressed the appeal letter to the wrong party does not function to dispose of his case since the defendant has a mechanism in place to forward such letters to the proper party.

The court further notes plaintiff re-submitted his request for the same information originally requested in 1993, on April 7, 1995. On April 21, 1995, defendant denied the request on the grounds that the documents are exempt pursuant to 5 U.S.C. § 552(b)(5). On May 2, 1995 plaintiff filed his administrative appeal, which was received by Judge

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[1] Since the court finds that plaintiff has exhausted his administrative remedies, plaintiff's motion for a stay of the proceedings pending the exhaustion of the same has become moot and will therefore be denied.

Advocate General on May 11, 1995. The defendant agency denied the appeal on June 27, 1995.[2]

The court, further concludes, the plaintiff's motion, made pursuant to Vaugh v. Rosen, 484 F.2d 820 (D.C. Cir 1973), for a Vaughn Index shall be granted. Accordingly, the defendant agency will provide to the plaintiff and the court the requisite, detailed information regarding the number of responsive documents, a means of identification, and the grounds for their withholding no later than **January 31, 1995**.

Accordingly, it is this 6th day of December 1995,

ORDERED that defendant's motion for summary judgment be and is hereby denied, and it is

FURTHER ORDERED that plaintiff's motion for a stay of the proceedings be and is hereby **denied as moot**; and it is

ORDERED that plaintiff's motion for a Vaughn Index be and is hereby granted.

SO ORDERED.

/s/ Ricardo M. Urbina
Ricardo M. Urbina
United States District Judge

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[2] The court notes that dismissing the case at this junction would not promote judicial economy by making the plaintiff initiate the entire process again. The defendant agency has already denied plaintiff's request for the same information on two occasions. Accordingly, the court concludes that it would be prudent to proceed to the merits of the action, rather than prolong an already protracted process.

Copies Sent To:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 95-0347 (RMU)

Charles C. Thompson, II

Plaintiff,

v.

Department of Navy

Defendant.

FILED
APR 16 1996
Clerk, U.S. District Court
District of Columbia

ORDER

Granting Plaintiff's Motion for a Revised Vaughn Index

After careful consideration of the pleadings and the record herein, the court concludes that Plaintiff's Motion for a Revised Vaughn Index shall be granted as Defendant has not included all documents that are responsive to Plaintiff's FOIA request in the initial Vaughn index submitted.

I. BACKGROUND

On February 22, 1995, Plaintiff (Charles C. Thompson, II) filed a complaint for declaratory and injunctive relief, seeking information from the Department of the Navy. Plaintiff seeks written documents, video, audio, and internal briefing reports regarding the April 19, 1989, U.S.S. Iowa explosion. This action arises under the Freedom of Information Act (FOIA) 5 U.S.C. §552, *et. seq.* (1994) amended. Plaintiff filed the action

after his FOIA request, dated June 1, 1993, was denied by the Defendant.

Plaintiff requested documents pertaining to the preparation of certain high ranking Navy officers, referred to as "Murder Boards," concerning public statements conducted in response to the 1989 explosion aboard the battleship U.S.S. Iowa. [1] The Navy identified only one videotape, and then withheld it as exempt under 5 U.S.C. § 552 (b) (5). On April 7, 1995, Plaintiff resubmitted the same FOIA request. On April 21, 1995, Defendant reiterated its earlier response, indicating that the video was no longer in Navy custody. On May 2, 1995, Plaintiff filed an administrative appeal, which was received by the Judge Advocate General on May 11, 1995. On June 27, 1995, the Defendant agency denied the appeal.

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[1] The original request submitted to Doris Lama, Head, PA/FOAI Branch, Department of the Navy, dated June 1, 1993 and the resubmitted request submitted to Rear Admiral Kendell Pease, Chief of Information, Department of the Navy, dated April 7, 1995 state the following:

> . . . I hereby request access to all documents, photographs, audio and/or video recordings of a "Murder Board" preparation of Admiral Leon Edney and Rear Admiral Richard D. Milligan by officers working for the Chief of Naval Information at the Navy Photographic Center in Anancostia on/or about September 6, 1989, prior to a press conference concerning the results of an investigation of an explosion . . . on the U.S. S. Iowa (BB-61) . . .
>
> . . . all other "Murder Board" type preparation documentation involving Admiral Milligan by Navy public affairs personnel concerning the Iowa explosion with individual media outlets, including "60 Minutes," during the years 1989 – 1990 . . .
>
> . . . all other "Murder Board" type preparation documentation involving Admiral Frank Kelso, the Chief of Naval Operations, by Navy public affairs personnel prior to Admiral Kelso's October 17, 1991, press conference and apology to the family of Gunners Mate Clayton Hartwig . . .
>
> . . . any and all documentation concerning the Iowa incident and investigation mentioned in internal briefing reports by the Office of the Chief of Naval Information from April 19, 1989, until the present date.

On August 8, 1995, Plaintiff submitted a motion, pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), requesting a court order requiring the Defendant to provide a Vaughn index listing every responsive document, as well as the appropriate statutory exemption for any withheld documents. On December 6, 1995, this court granted the motion. On January 31, 1996, Defendant filed a Vaughn index with this court, listing only five items as responsive to Plaintiff's request and holding these items exempt pursuant to 5 U.S.C. § 552 (b)(5). The five identified items are:

> (1) An unsigned memorandum to Admiral Kelso: (2) notes and deliberations for Rear Admiral Schachte: (3) a memo from Public Affairs Office to Chief of Naval Operations (CHINFO): (4) a draft response to media inquiries and cause of death: and (5) the videotape of Rear Admiral Milligan's "60 Minutes" practice interview.

The index was accompanied by an affidavit supporting the sufficiency of the index, attested to by Captain John K. Henebery, JAG Corps. United States Navy.

On February 26, 1996, Plaintiff objected to the sufficiency of the index and filed a motion requesting that the court order the Defendant to file a revised index incorporating all responsive information to Plaintiff's original FOIA request.[2] On March 11,

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[2] Plaintiff specifically argues in his Objections to the Vaughn Index that,

> 1. Defendant has exercised bad faith in the search for responsive documents and production of the Vaughn index;
>
> 2. The Vaughn index fails to include documents that are identified elsewhere as clearly responsive;
>
> 3. The number of documents identified in defendant's Vaughn index are not commensurate with the level of agency public affairs and media activity surrounding the U.S. S. Iowa explosion;

1996, Defendant filed a response to this motion, claiming that the index provided all of the information that could be considered responsive to Plaintiff's narrow request. The response was accompanied by a second affidavit from Lieutenant Commander Robert W. Redcliff, setting out the scope of the search and the methodology used to conduct it. Defendant further stated that Plaintiff is attempting to expand the original FOIA request to include information not requested at the administrative level.[3] On March 22, 1996, Plaintiff filed a reply in support of Plaintiff's objections to the Vaughn index maintaining that the scope of Mr. Thompson's FOIA request has remained constant and clear.[4]

II. DISCUSSION

A. Adequacy of Index

When examining whether an agency should withhold or produce documents on complaint, the court must undertake a *de novo* review.[5] At issue in the instant case is the adequacy

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> 4. Defendant's affidavit in support of the Vaughn index fails to provide minimally required information concerning the scope and methodology of the search, and the exemptions claimed for identified documents;
>
> 5. Defendant's Vaughn index fails to provide adequate information to allow plaintiff to advance arguments, or for the Court to make a reasoned judgment on whether the documents should be exempt from disclosure.

[3] See Defendant's Response to Plaintiff's Objection to Vaughn Index at p.10.

[4] See Plaintiff's Reply in Support of Plaintiff's Objection to Vaughn Index at p.1.

[5] 5 U.S.C. § 552 (a) (4) (B) states in pertinent part,

> On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

of the index, the reasonableness of the search and the sufficiency of the declaration. Presently, the agency "must be able to show what records were searched, by whom, and through what process." [6] To prevail in a FOIA action, the agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." [7] Thus, the agency is under a duty to conduct a "reasonable" search for responsive records.[8] If the court finds that an index is insufficient, the court may remand and require a more detailed index. [9] However, the court must first evaluate the sufficiency of the initial Vaughn index. Id. Finally, facts concerning the adequacy of a search for responsive documents are to be viewed in the light most favorable to the requester.[10]

The central issue presented by Plaintiff's motion is the scope of Plaintiff's request and whether or not it has remained constant. Defendant argues that the Plaintiff's request is "very specific" and "expressly limited." [11] Defendant further maintains that Plaintiff's June 1, 1993 request and the request

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6 Steinberg v. United States Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994).

7 Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985).

8 Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990.);

9 See Davin v. United States Dep't of Justice, 60 F.3d 1043, 1065 (3rd Cir. 1995); Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979); Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 230-40 (1st Cir. 1994); and Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991). cert. denied, 505 U.S. 1212 (1992).

10 See Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985), citing Weisberg v. Webster, 749 F.2d 864 (D.C. Cir. 1984).

11 See Defendant's Response to Plaintiff's Objection to Vaughn Index at p. 9 and attached Exhibit B at p. 3.

included in Plaintiff's complaint, paragraph 6, are different statements and therefore, have different request objectives.[12] Moreoever, the Defendant avers that it has complied with Plaintiff's original FOIA request. However, Defendant takes too narrow of a reading of Plaintiff's original FOIA request. Plaintiff's original request called for a search of documents from *the office of* the Chief of Naval Information (CHINFO). Defendant contends, however, that the request as articulated in Plaintiff's complaint was for documents "from a single originator, namely *the* Chief of Naval Information." [13] It is important to note that the difference in the language between the two statements is merely two words. [14] Moreover, it is well settled that, "an agency must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files." [15]

It is well settled that a plaintiff cannot expand the scope of his FOIA challenge beyond the bounds of his

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[12] See Defendant's Answer, paragraph 6.

[13] See Defendant's Response to Plaintiff's Objection to Vaughn Index, Exhibit B, p. 3.

[14] The June 1, 1993 request states in pertinent part,

. . .any and all documentation . . . by the *Office of* the Chief of Naval Information . . .

Plaintiff's Complaint, paragraph 6 states in pertinent part,

. . . all documentation . . .by *the* Chief of Naval Information . . .

[15] See Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); See also Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984 (agency required to read FOAI request as drafted, "not as either [an] agency or [the requester] might wish it was drafted"); Truitt v. Department of State, 897 F.2d 540, 544-546 (D.C. Cir. 1990) (where request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as its search did not include file likely to contain responsible records); see also Feri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981).

administrative request or any limitations thereafter.[16] There is no reason to believe that Plaintiff has limited or expanded his request in any way. Plaintiff cited examples of what he believed to be clearly responsive documents in the privilege log created in Hartwig v. United States, (N.D. Ohio Civil No. 1:92 CV 1315) (the Hartwig litigation). The Hartwig litigation involves a civil lawsuit filed by family members of Gunners Mate Clayton Hartwig in the United States District Court for the Northern District of Ohio. The Department of Justice took custody of Department of Navy records related to the U.S.S. Iowa incident and created a log of documents.[17] By submitting these examples to the Department of the Navy, Plaintiff did not act to limit the Navy's search to the boundaries of the Hartwig litigation. Rather, the Defendant should look to the plain language of Plaintiff's request to determine the appropriate scope of the search. The Defendant will still have an opportunity to claim an exemption for the withholding of any future documents, but both the documents and the exemption should be included in the index.[18]

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[16] See National Magazine v. Department of State, No. 92-2303, slip op. At 13-16 (D.D.C. Aug. 18, 1995) (A requestor has no grounds to subsequently challenge the adequacy of the search where he has limited the scope of his request either administratively or in the course of litigation).

[17] In denying the 1995 request, the Navy acknowledges there were agency documents in the possession of the Justice Department. The search at issue here includes, but is not limited to, a review of the documents in the possession of the Justice Department compiled for the Hartwig litigation. After reviewing these documents, the Defendant maintained that only four documents and the video tape were responsive.

[18] The Defendant might feel that mere listing of the documents may constitute a breach of security. However, this concern may be addressed by an in camera review of any sensitive documents. See Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

B. Reasonableness of the Search

Courts generally evaluate a search's reasonableness by reviewing the agency's retrieval efforts in light of the parameters specified in the FOIA request.[19] Although the adequacy of the search is "dependent upon the circumstances of the case." [20] The agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." [21]

As to the issue of when a request may be too broad or burdensome, "the key factor is the ability of an agency's staff to reasonably ascertain and locate exactly which records are being requested." [22] Agencies are, however, not required to conduct "wide-ranging, unreasonably burdensome [searches] for records." [23] A request which would require an agency to "locate, review, redact, and arrange for inspection a vast quantity of material" is "so broad as to impose an unreasonable burden upon the agency." [24]

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19 See e.g. Church of Scientology. v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978).

20 See Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see also Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) ("depends upon the facts of each case").

21 Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); see Maynard v. CIA, 986 F.2d 547, 559 and; see also SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

22 See Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982).

23 See Van Drum v. EPA, No. 91-35404, slip op. at 3 (9th Cir. Aug. 17, 1992) (agency justified in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources).

24 See American Fed'n of Government Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990); but see also, Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982)

The request in the present is not overly burdensome since the information is not only determinable, but has to a large extent already been located by the Defendant. The Defendant has conceded to not only finding the documents, but to "personally review[ing]" them.[25] The documents are not in the Vaughn index because the Defendant believes they are not responsive to the Plaintiff's request. This is so because the Defendant has taken an unneccessarily narrow reading of Plaintiff's request. Moreover, the Plaintiff's request has remained constant and clear since he initially submitted the FOIA request at the administrative level.

C. Sufficiency of Defendant's Declaration

To prove the adequacy of its search, an agency may rely upon affidavits, provided that they are "relatively detailed, nonconclusory, and submitted in good faith." [26] Such affidavits must show "that the search method was reasonably calculated to uncover all relevant documents" and must "identify the terms searched or explain how the search was conducted." [27] "[A]ffidavits submitted by an agency are accorded a presumption of good faith." [28] The Navy has presently submitted an index with, what it believes to be, the only responsive documents to the Plaintiff's request. This index was accompanied by an affidavit from Captain Henebery, supporting its completeness. This gives raise to the presumption of good faith.

However, the good faith presumption is only applicable when the agency has provided a detailed explanation concerning

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(holding valid a request encompassing over 1,000,000 computerized records.

25 See Defendant's Response to Plaintiff's Objection to Vaughn Index, at attached Exhibit "B" p. 3.

26 See Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).

27 See Oglesby v. United States Dep't of the Army, 920 F.2d at 68.

28 See Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994).

the withholdings.[29] The index and affidavit must provide reasonably detailed and nonconclusory descriptions of the scope and method by which the search was conducted.[30] Courts have held that "[all] that is the least that is required is that the requestor and the trial judge be able to derive from the index a clear explanation of why each document . . . withheld is putatively exempt from disclosure." [31] The index and accompanying affidavit of Captain Henebery in the present case, do not provide sufficient information concerning the scope and methodology of the search. The index and the affidavit do not provide enough information, with respect to the Plaintiff's request, to "enabl[e] the court to make a reasoned independent assessment of the claim[s] of exemption." Id.

Defendant also provided a second declaration by Lieutenant Commander Robert W. Redcliff attached to its Response to Plaintiff's Objection to the Vaughn Index. Although this affidavit is more comprehensive vis-a-vis the scope and methodology of the search, the declaration rests on the false assumption that the request has been narrowed to merely include *the* Chief of Naval Information, as opposed to the *office of* the Chief of Naval Information.

A search of records that involves the entire office of a department would certainly yield more information than a search of records that involves a single individual. The question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." [32]

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[29] See Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 233 (1st Cir. 1994).

[30] See Maynord v. CIA, 986 F.2d 547 (1st Cir. 1993).

[31] Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994)(quoting Vaughn v. United States, 936 F.2d at 866-67).

[32] See Steinberg v. United States Department of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

The adequacy of an agency's search is measured by a standard of reasonbleness, that is, "the reasonableness of the effort in light of the specific request." [33] The original request calls for information by *the office of* the Chief of Naval Information (CHINFO) and the Defendant should comply with the original request.

Accordingly, the Defendant shall search for any responsive CHINFO documents beyond those relating to the privilege log file. The Defendant is to include a meaningful identification of all responsive documents and the claims of exemption for each document withheld.[34] The Defendant shall supply the court and the Plaintiff with a copy of the revised Vaughn index no later than May 30, 1996.

Accordingly, it is this 16 day of April 1996.

ORDERED that Plaintiff's Motion for a Revised Vaughn Index be and is hereby **granted.**

SO ORDERED

/s/
Ricardo M. Urbina
United States District Judge

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[33] Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986); see also Maynard v. CIA, 986 F.2d at 560.

[34] See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); and Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-347 (RMU)

Charles C. Thompson, II,

Plaintiff,

v.

Department of the Navy,

Defendant.

FILED
JUN 6 1997
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

ORDERING THE DEFENDANT TO SUBMIT A DETAILED AFFIDAVIT(S)

This matter comes before the court upon the parties' cross-motions for summary judgment. Plaintiff seeks access to documents and a videotape in the possession of the Department of the Navy pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. The information relates to the Navy's preparation of several high-ranking officers for public statements regarding the April 19, 1989, explosion aboard the U.S.S. Iowa. The Navy has invoked the "deliberative process" and "invasion of privacy" exemptions, 5 U.S.C. §§ 552 (b)(5) and (b)(6). Plaintiff claims that the Navy has incorrectly characterized several of the documents in order to qualify for the

FOIA's exemptions and thereby avoid releasing the information he seeks.

In order to resolve the outstanding motions and to determine whether an in camera review of the materials at issue is necessary[1], the Navy shall submit to the court a detailed affidavit(s) fully explaining the Navy's justification for withholding the materials at issue in this case.

Accordingly, it is this 6 day of June 1997,

ORDERED that Navy file a sworn affidavit(s) detailing its justifications for the claimed exemptions on or before June 19, 1997; and it is

FURTHER ORDERED that the Navy hand-deliver, to chambers, a copy of the affidavit(s).

SO ORDERED.

/s/
Ricardo M. Urbina
United States District Judge

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[1] See Manna v. United States Dep't of Justice, 832 F. Supp. 866, 874 (D.N.J. 1993) (government should be permitted to submit more detailed Vaughn explanation before court resorts to in camera review).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-347 (RMU)

Charles C. Thompson, II,

Plaintiff,

v.

Department of the Navy,

Defendant.

FILED
AUG 18 1997
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM ORDER

GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, Charles Thompson, brings this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, against the Department of the Navy (the Navy). Mr. Thompson seeks the disclosure of materials relating to the preparation of senior Navy officials for press conferences following the 1989 explosion aboard the USS Iowa. The parties have filed cross-motions for summary judgment. The issue before the court is whether the Navy properly withheld the requested materials pursuant to deliberative process and privacy exemptions of FOIA. *See* 5 U.S.C. §§ 552 (b)(5) and (b)(6). After considering the parties' submissions and the relevant law, the court concludes that the Navy properly withheld the items.

II. BACKGROUND

On June 1, 1993, Mr. Thompson, a producer of the television news magazine, "60 Minutes," submitted a FOIA request to the Navy. He sought all the information in the Navy's possession concerning the Navy's preparation of high-ranking Navy officials for press conferences following the 1989 explosion aboard the USS Iowa. On June 17, 1993, the Navy denied the request pursuant to 5 U.S.C. § 552 (b)(5). On June 24, 1993, Mr. Thompson administratively appealed the Navy's decision. On April 7, 1995, Mr. Thompson submitted a second request for the same documents. On April 21, 1995, the Navy denied Mr. Thompson's second request. On June 27, 1995, the Navy denied Mr. Thompson's administrative appeal. Mr. Thompson then filed suit in this court requesting declaratory and injunctive relief pursuant to FOIA.

On March 14, 1995, the Navy moved to dismiss Mr. Thompson's complaint on the basis that he had failed to exhaust his administrative remedies. On December 6, 1995, the court denied the Navy's motion concluding that Mr. Thompson had, in fact, exhausted his administrative remedies. In addition, the court ordered the Navy to conduct a search and produce an index in accordance with standards set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). On January 31, 1996, the Navy submitted the index. This index listed five records, all of which the Navy withheld pursuant to 5 U.S.C. § 552 (b)(5). Subsequently, on February 26, 1996, Mr. Thompson filed objections to the Navy's index. Mr. Thompson asserted that the Navy's index was inadequate. On April 16, 1996, the court ordered the Navy to conduct an additional search and to submit a revised *Vaughn* index. The Navy conducted a new search and identified 220 documents as being responsive to Mr. Thompson's request. The Navy released all the documents with the exception of seven items that it withheld pursuant to the deliberative process and privacy exemptions. *See* 5 U.S.C. §§ 552 (b)(5) and (b)(6). The Navy has since released one of the seven withheld items.

Subsequently, the parties filed cross-motions for summary judgment. In conjunction with its motion for summary judgment, the Navy submitted an affidavit setting forth its reasons for withholding the items in issue. On June 6, 1997, the court directed the Navy to submit a supplemental, detailed affidavit fully explaining its justification for withholding the requested materials.

The remaining materials at issue consist of documents and a videotape prepared by the Department of Justice in connection with a civil case brought by family members of one of the gunners involved in the USS Iowa incident, Clayton Hartwig.[1] Two of the documents relate to disciplinary records of certain USS Iowa crew members. The requested items are numbered in the *Vaughn* index as items 2, 3, 4, 5, 87, and 195. Items 2 and 3 are documents that address the Navy's policy on responding to press inquiries. Item 2 consists of hypothetical questions prepared by Navy staff members in anticipation of a Navy official's upcoming media interview. Item 3 consists of a subordinate's critique of a senior Navy official's practice interview. Item 4 is a draft answer to a hypothetical media question. Item 5 is a videotaped practice session in which a mock interview was used to test potential responses to media inquiries and to prepare officials to answer questions from members of the press. Item 87 is a rejected draft of a statement addressing disciplinary action taken against USS Iowa personnel in the wake of the 1989 explosion. Item 195 is a document addressing incidents unrelated to the USS Iowa explosion containing personal information about an individual member of the USS Iowa crew.

II. SUMMARY JUDGMENT AND FOIA

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In FOIA cases, a district court may grant summary judgment solely on the basis of agency affidavits if they are

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[1] The Hartwig case is pending in the United States District Court for the Northern District of Ohio. *See Hartwig v. United States*, civil action no. 92cv1315 (N.D. Ohio).

clear, specific, reasonably detailed, and there is no contradictory evidence on the record or evidence of agency bad faith. *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). There is a presumption that the agency acted in good faith. A plaintiff, however, may rebut this presumption by proffering evidence of agency bad faith. *Maynard v. CIA*, 986 F.2d 547, 560 (lst Cir. 1993) (internal citation omitted); *see also SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Kuffel v. United States Bureau of Prisons*, 882 F. Supp. 1116, 1120 (D.C. 1995) (citing *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The defendant agency has the burden of justifying nondisclosure. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *Voinche v. FBI*, 940 F.Supp. 323, 327 (D.D.C. 1996) (citing *Nat'l Cable Television Ass'n Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

II. EXEMPTION 5[2]

The Navy has withheld items 2, 3, 4, and 5 pursuant to Exemption 5. In its affidavits, the Navy contends that the

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[2] In *Hartwig v. United States*, civil case no.92cv1315, the court found the items in issue in this case to be discoverable despite the Navy's contention that they were privileged. They are currently subject to a protective order restricting the *Hartwig* plaintiffs' use of the materials to matters related to that litigation.

In analyzing the Navy's arguments in this case and in evaluating the relationship between discovery rules and FOLA, the court must be mindful of the fact that:

> [The] discovery standard can only serve as a "rough guide" to the courts, since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

Therefore, materials released in the context of civil discovery will not necessarily be released pursuant to FOIA.

materials at issue may be withheld pursuant to Exemption 5 because they reflect the strategy sessions in which the Navy formulated its policy for dealing with media inquiries into the USS Iowa incident.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552 (b)(5). Exemption 5 extends protection to those documents that are usually privileged in the civil discovery context. *NLRB v. Sears*, 421 U.S. 132, 149 (1975); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). That is, Exemption 5 incorporates "all civil discovery rules[.]" *Martin*, 819 F.2d at 1185. Thus all discovery privileges that exist in civil discovery apply to Exemption 5. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984). The three primary privileges that courts have incorporated into Exemption 5 are the deliberative process privilege, the attorney work-product privilege and the attorney-client privilege. *NLRB*, 421 U.S. at 149. At issue in this case is the deliberative process privilege.

The purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151. The bases for this privilege are to: (1) encourage open, frank discussions on matters of policy between subordinates and superiors; (2) protect against premature disclosure of proposed policies before they are finally adopted; and (3) protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russel v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). In essence, the privilege protects the "'decision making processes of government agencies' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part

of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears*, 421 U.S. 132, 150 (1975) (internal citations omitted).

In order for the deliberative process privilege to apply, the Navy must establish two prerequisites. First, it must establish that the communication was predecisional. *Jordan*, 591 F.2d at 774; *Access Reports v. Department of Justice*, 926 F.2d 1191, 1194 (D.C.Cir.1991). That is, the Navy must establish that the communication was "antecedent to the adoption of an agency policy." *Id.* "To the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Petroleum Information Corp. v. U.S. Dept. of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Thus, "the existence of the privilege [does not] turn on the ability of the [Navy] to identify a specific decision in connection with which a [document] is prepared." *NLRB*, 421 U.S. at 151 n. 18. Second, it must establish that the communication was deliberative, *i. e.* a direct part of the deliberative process in that it makes recommendations or expresses opinions. *NLRB*, 421 U.S. at 154; *Jordan*, 591 F.2d at 774; *Vaughn v. Rosen*, 523 F.2d 1136, 1143- 44 (D.C. Cir. 1975); *Access Reports*, 926 F.2d at 1194.

The Navy has withheld items 2, 3, 4, and 5 pursuant to Exemption 5. Items 2, 3 and 4 were developed by the Department of Justice in connection with the Hartwig litigation. Item 2 was prepared in connection with Admiral Schachte's preparation for an interview with Mr. Mike Wallace, of "60 Minutes." At the time, Admiral Schachte was Commander, Naval Investigative Service (NIS) Command. Specifically, item 2 pertains to hypothetical questions Mr. Wallace could pose to Admiral Schachte in an interview. Item 3 is a critique, by a Navy official, of a practice interview of the NIS Commander by a subordinate staff member.[3] Item 4

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[3] It is unclear from the record whether the NIS Commander referred to in connection with Item 3 is Admiral Schachte.

is a draft answer to a possible media inquiry. Item 5 is a video-tape of a mock press conference used to prepare a senior Navy official for a press conference.

These items are all predecisional in nature, as that term has been judicially interpreted. The Navy need not establish that the items in question were prepared in connection with a specific decision.

> Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

NLRB, 421 U.S. at 151 n.18; *see also Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989) (stating that a court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise"). Rather, the Navy must only establish "what deliberative process [was] involved, and the role played by the [items] in issue in the course of that process." *Coastal States Gas Corp.*, 617 F.2d at 868. The critical factor in determining whether the material is "deliberative" in nature "is whether disclosure of the information would 'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195 (quoting *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987)).

The Navy's affidavits establish that it was engaged in a predecisional, deliberative process concerning what information it was going to disclose to the media vis-a-vis the explosion aboard the USS Iowa. In addition, the Navy has sufficiently demonstrated what role the items in issue played in that process. That is, the items were prepared by subordinate officials for the benefit of senior Navy officials who were preparing for inquiries

from members of the media.[4] The deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. This is precisely the type of material in issue in this case. Moreover, disclosure of materials reflecting the process by which the Navy formulates its policy concerning statements to and interactions with the press could potentially "stifle honest and frank communication within the [Navy]." *Id.* at 866, *see also Access Reports*, 926 F.2d at 1195; *Dudman Communications Corp.*, 815 F.2d at 1567-68. The court therefore determines that each item may be withheld in its entirety pursuant to Exemption 5.

IV. EXEMPTION 6

The Navy may withhold information in "personnel or medical files and similar files, disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b) (6). The Supreme Court has determined that the term 'similar files' should be given a broad judicial interpretation. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982). The Navy has withheld items 87 and 195 pursuant to this exemption. In applying Exemption 6, the court must balance the potential invasion of privacy against the public's interest in disclosure. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Armstrong v. Executive Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996).

Items 87 and 195 come within the ambit of Exemption 6. Item 87 contains the names of certain USS Iowa crew members that the Navy disciplined following the incident aboard the USS Iowa. Item 195 also contains information

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[4] "A key feature under both the 'predecisional' and 'deliberative' criteria is the relationship between the author and the recipients of the document." *Access Reports*, 926 F.2d at 1195. A document from a junior to a senior official is more likely to be predecisional than a document flowing in the opposite direction. *Id.*

relating to disciplinary actions taken by the Navy against a USS Iowa crew member. Such information is of the type that would be included in a personnel file. Thus, in the court's view, items 87 and 195 qualify as "similar files" under Exemption 6.

Mr. Thompson maintains that the Navy has waived any privacy interests that the individual crew members might have had in items 87 and 195 by publicly disclosing the information included in those documents.[5] Mr. Thompson has the burden of production as to this issue. *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992). That is," a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983). Other than conclusory allegations, Mr. Thompson has not submitted any support whatsoever for his position. He refers the court to attachment number 3 to his motion for summary judgment. *See* Plaintiff's Motion for Summary Judgment at 5. There is no such attachment.[6] The court informed Mr. Thompson's counsel of the omission. His counsel in turn advised the court that he would be filing the attachment with the court. He has not, however, filed the attachment. Consequently, Mr. Thompson has not satisfied his burden of production. Accordingly, items 87 and 195 are exempt from disclosure.

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[5] Mr. Thompson does not dispute the fact that the items in issue qualify as "similar files" under Exemption 6. His sole argument in support of disclosure is that the Navy waived any privacy considerations that might apply by publicly disclosing the information contained in items 87 and 195.

[6] The two attachments to Mr. Thompson's motion are two orders issued by the Ohio federal court in connection to the *Hartwig* litigation.

V. CONCLUSION

For the foregoing reasons, it is this 18th day of August 1997,

ORDERED that defendant's motion for summary judgment be and is hereby **GRANTED**; and it is.

FURTHER ORDERED that this action be **DISMISSED** from the docket of this court; and it is

ORDERED that judgment be and is hereby entered in favor of the **DEFENDANT**.

SO ORDERED.

/s/ Ricardo M. Urbina
Ricardo M. Urbina
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:92cv1315

HON. GEORGE W. WHITE

EARL V. HARTWIG

Plaintiff

vs.

UNITED STATES OF AMERICA

Defendant

FILED
1996 JUN 11 AM 10:04
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

MEMORANDUM AND ORDER

This matter is before this Court upon the objections of the defendant United States of America to the order of the Magistrate Judge dated April 18, 1995, granting plaintiff's motion to compel the production of documents withheld solely upon the basis of the deliberative process privilege and upon his order of May 12, 1995 denying defendant's motion for reconsideration of the April 18, 1995 order.

The government contends that the documents and video in question are protected by the deliberate process privilege. The privilege is predicated on the policy of protecting the decision making process of government agencies and the focus is on documents reflecting advisory opinions,

recommendations and deliberations comprising part of a process by which governmental decision and policies are formulated. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-151, 95 S.Ct. 1504, 1516-1517, 44 L.Bd. 2d. 29 (1975). It does not encompass purely factual materials or factual findings and conclusions as opposed to opinions and recommendations. *Resolution Trust Corp. v. Diamond*, 137 FRD 634, 640-641 (SD NY 1991). The privilege must be asserted by the head of the agency after consideration of the alleged by privilege material. *Id.* At 642.

Two Declarations have been filed by Secretary Dalton. The first Declaration has been replaced after the Magistrate Judge's ruling of April 18, 1995 found it to be insufficient. The Court has reviewed the second Declaration, along with the videotape and documents submitted to the Court by the defendant.

The defendant asserts as to a specific document that it is within the deliberative process privilege became it would impair the Navy's ability to conduct evaluations, to solicit recommendations, to effectively manage accident investigations, to develop a plan for action on specific subjects by revealing internal recommendation, or it would discourage candid discussion. However, review of the documents shows, as the Magistrate Judge recommended, that the documents are considerations, Navy procedure or Navy operations that will not be considered to be covered by the deliberative process privilege. The video tape contains preparation of an official for a public appearance.

Accordingly, the objections to the Magistrate Judge's rulings of April 18, 1995 and May 12, 1995 are overruled. The decision of the Magistrate Judge is affirmed. Plaintiff's motion to compel is granted. Defendant's motion for reconsideration is denied. Defendant shall produce all documents listed in the Supplemental Declaration of John H. Dalton, Secretary of the Navy within 30 days of this order.

IT IS SO ORDERED.

/s/ George W. White
George W. White
Chief Judge
UNITED STATES DISTRICT COURT